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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 280

FUNK BROTHERS SEED COMPANY,
Petitioner,

vs.

KALO INOCULANT COMPANY,
Respondent.

RESPONDENT'S REPLY.

Petitioner's Reply Brief conclusively establishes that petitioner is here seeking a review of fact questions decided adversely to petitioner by the Court below, and that the false issue presented by the Petition is predicated on an erroneous assumption that constitutes a misinterpretation and distortion of the opinion of the Court below* (Respondent's Br. p. 1).

We are content to rest our characterization of the issue as presented in the Petition on the restatement thereof contained in petitioner's Reply Brief (p. 1). Although this restatement now concedes (1) that the issue does not involve broadly the "law of nature" point stated in the

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* In the case of *Missouri-Kansas-Texas Railroad Company* v. *Texas*, 275 U. S. 494, cited by petitioner (Reply Br. p. 1), this Court vacated the granting of the writ because "the grounds advanced for the granting of the writ prove, upon an examination of the record, not to have a substantial basis" (Respondent's Br. p. 10).

petition, but instead involves a fact question, i. e., the truth of Bond's theory of inhibition (Respondent's Br. pp. 2, 8), petitioner persists (2) in its refusal to acknowledge that the Court below expressly found that the patentee "did much more than discover a law of nature" (Respondent's Br. p. 1).

Petitioner correctly quotes (Reply Br. p. 2) the holding of the Court below, but to support its "law of nature" point ignores the requirement for "application of that quality in a successful combination which is of value to mankind." Petitioner bases its case on the assumption, which its own quotation establishes as erroneous, that the Court below broadly held that "the discovery of a natural phenomenon or of a quality or attribute of a well known article . . . is entitled to patent protection." As stated in our main Brief, this is a distortion of the opinion of the Court below.

Petitioner's reply (pp. 3 and 4) challenges our statement of the problem solved by Bond. Again this is a question of fact which the Court below decided adversely to petitioner, saying (R. 822):

> "This problem had not been solved by any one and it apparently daunted Bond, for, at first, it appeared insoluble. . . . His scientific investigation led to a proper solution, which we think the evidence shows had baffled the workers in the prior art because of their mistaken assumption of supposedly universal inhibitive effect encountered in mixed cultures."

Petitioner's long footnote (Reply Br. pp. 4, 5) again seeks a determination of a fact question, saying: "We leave it to the Court whether Kronenberger . . . or Petitioner's experts . . . will be believed." The question of the credibility of petitioner's experts was decided ad-

versely to petitioner by the District Court and was concurred in by the Court of Appeals (Respondent's Br. p. 8).

Petitioner (Reply Br. pp. 6-8) has not met our analysis of the two decisions of the Ninth Circuit Court of Appeals in the *Vitamin Technologists, Inc.*, case, nor the relation of these two decisions to *Dennis* v. *Pitner* (Respondent's Br. pp. 14-16). At most, petitioner has shown that Judge Healy, who wrote special concurring opinions in both decisions of the case, did not change his position on the law of nature defense. Petitioner cannot show that the majority of the court did not, as we have demonstrated, reverse its position on the law of nature defense.

In any event, it is immaterial here whether the *Vitamin Technologists* case is in conflict with *Dennis* v. *Pitner* as interpreted by petitioner, because the decision of the Court below in this case did not hold that a mere discovery of a law of nature constitutes patentable subject matter. On the contrary, the different results reached in this case and in the *Vitamin* case arose from the different facts involved. In the second opinion in the *Vitamin* case, it was held that the Steenbock patents, while not merely directed to a "law of nature," were anticipated by the prior art. The Court below held that the Bond patent was directed to *much more* than a law of nature; was not anticipated by the prior art (R. 825); arose to the dignity of invention (R. 827); and disclosed "a new patentable composition" (R. 824).

The additional quotation from Walker on Patents presented in petitioner's reply (p. 8) confirms the fact that the Bond inoculant constitutes a patentable composition of matter. The "different or additional property" which the Bond inoculant possesses is its ability to fix nitrogen in leguminous plants of more than one cross inoculation group with the same efficiency as single inoculants utilizing the same strains. None of the several ingredients, i. e., the

separate species of bacteria, individually possesses this ability." Furthermore, the Bond mixed inoculant was not "a well known substance."

Petitioner concedes (Reply Br. p. 9) that the rule of *General Electric Co.* v. *Wabash Appliance Corp.*, 304 U. S. 364, and *Halliburton Oil Well Cementing Co.* v. *Walker*, 329 U. S. 1, is avoided if the claim language is "limiting" in character. We have demonstrated (Respondent's Br. pp. 24-26) that the language employed in the Bond claims is aptly descriptive of the physiological characteristics of the bacteria, aptly distinguishes over the prior art, and clearly fixes the limits of the invention.

The affidavit of Miles M. Elmers (Reply Br. pp. 11-15) and petitioner's reargument (Reply Br. pp. 5 and 6) merely confirm respondent's position that there is sharp disagreement between the parties with respect to the *proportion* of the total inoculant business inside and outside the Seventh Circuit (Respondent's Br. pp. 21-23) and do not deny that there are at least four manufacturers of inoculants located in three circuits other than the Seventh. Clearly the rule applied in *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, is not applicable here.

Respectfully submitted,

J. Bernhard Thiess
Sidney Neuman
M. Hudson Rathburn
Counsel for Respondent.